Fresh & Easy Neighborhood Market Inc. *and* United Food and Commercial Workers International Union, Region 8—Western. Cases 21–CA–38882 and 21–CA–39100

January 31, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On June 3, 2010, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief to the Acting General Counsel's answering brief. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fresh & Easy Neighborhood Market Inc., Spring Valley, California, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Spring Valley, California facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily com-

[1] In its exceptions, the Charging Party argues that the judge erred in granting the Respondent's petition to revoke the Charging Party's subpoena duces tecum. That subpoena sought all documents the Respondent had provided to the General Counsel pursuant to the General Counsel's subpoena. At the hearing, counsel for the Charging Party stated that he specifically sought the Respondent's written employment policies. We find it unnecessary to pass on the judge's ruling on the petition to revoke because the Charging Party has suffered no prejudice as a result of it. See *Electrical Workers Local 11 (Los Angeles NECA)*, 270 NLRB 424, 424 fn. 1 (1984) (unnecessary to pass on judge's subpoena ruling given disposition of the case), enfd. 772 F.2d 571 (9th Cir. 1985).

[2] The complaint alleged that the Respondent violated Sec. 8(a)(1), in three instances, by inviting employee Shannon Hardin to resign because of her concerted activities. There are no exceptions to the judge's dismissal of two of these allegations, involving Team Lead Sylvia Soliz' August 2, 2009 statements to Hardin about Hardin's unemployment benefits. The judge concluded that those two statements, together with a third conversation, were best addressed as a single violation. In that third conversation, Hardin and coworker Zuri Sadai criticized a warning issued to Hardin, and Soliz responded, "Well, I know if I had a manager that didn't like me, I would take my check and walk out." We agree with the judge that Hardin and Sadai could reasonably construe Soliz' statement as an implicit invitation for them to resign because of their protected concerted criticism of the warning. *Double D Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."). In addition, Member Pearce relies on the fact that Soliz was the very supervisor whom the employees were criticizing when Soliz told them that she would walk out if a manager disliked her. Under those circumstances, Member Pearce finds that Soliz' implicit invitation to resign was particularly coercive.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) on June 11, 2009, when Store Manager James Tillinghast told Hardin that she was prohibited from talking about the Union on the sales floor, we find that Corporate Human Relations Manager Paula Agwu did not effectively repudiate Tillinghast's unlawful directive under *Passavant Memorial Hospital*, 237 NLRB 138, 138–139 (1978). Agwu's comments failed to unambiguously inform Hardin that Tillinghast had been wrong and that employees are free to talk about the union while on the sales floor. See *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6, 1383 (2007) (no effective repudiation in part because employer "did not admit any wrongdoing, it simply informed employees that it was clarifying its policy"). Further, the Respondent again violated Sec. 8(a)(1) on August 3, 2009, when Tillinghast repeated his unlawfully overbroad rule, and the Respondent thereafter made no attempt at repudiation.

Member Hayes does not pass on whether a repudiation of an unlawful rule is ineffective unless it satisfies all of the requirements stated in *Passavant Memorial Hospital*, supra. He agrees with his colleagues that the Respondent's attempt to repudiate Store Manager Tillinghast's unlawful prohibition on talking about the Union on the sales floor was insufficient under all of the circumstances of this case, particularly Tillinghast's reaffirmation of the prohibition on August 3.

Member Hayes does not, however, agree with the judge's finding that Team Leader Soliz unlawfully invited employee Hardin to resign because of her concerted activities. Standing near the store's checkout area and speaking loudly enough to be overheard, Hardin and fellow employee Sadai criticized Soliz for issuing Hardin a lawful warning for shouting across the store at a coworker. In response, Soliz stated, "Well, I know if I had a manager that didn't like me, I would take my check and walk out." In Member Hayes' view, a reasonable employee would not construe Soliz' statement of what she would do under certain circumstances, uttered merely in response to the critical comments of Hardin and Sadai, as an "invitation" for Hardin to resign because of her involvement in protected activity. As such, he would dismiss this allegation.

[3] We shall modify the judge's recommended Order to provide for posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We deny the Charging Party's request for extraordinary remedies.

municates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the position of mailhandler at its Spring Valley facility since June 11, 2009."

Robert MacKay, Esq., for the General Counsel.
Stuart Newman and *Molly Eastman, Esqs. (Seyfarth Shaw, LLP)*, of Atlanta, Georgia, and Chicago, Illinois, for the Respondent.
David A. Rosenfeld, Esq. (Weinberg, Roger, & Rosenfeld), of Alameda, California, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Diego, California, on March 23, 2010. The original charge was filed June 12, 2009,[1] by the United Food and Commercial Workers International Union, Region 8—Western (the Union) and the order consolidating cases, consolidated amended complaint and amended notice of hearing (the complaint) was issued January 11, 2010. The complaint alleges that Fresh & Easy Neighborhood Market, Inc. (Fresh & Easy) violated Section 8(a)(1) by orally promulgating a rule that prohibited employees from talking about the Union while on the clock or while on the sales floor and orally promulgating another rule that prohibited employees from discussing discipline with other employees while working on the sales floor. The complaint also alleges that Fresh & Easy violated that same section of the Act by impliedly threatening an employee engaged in union or protected concerted activity. Fresh & Easy filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, jurisdiction and interstate commerce, labor organization status, and agency status. It denied the substantive allegations of the complaint.

Although I describe instances involving discipline, I do so for background purposes only. There are no Section 8(a)(3) allegations in the complaint

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Fresh & Easy, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Fresh & Easy, a corporation and a subsidiary of Tesco, PLC, is engaged in the retail sale of groceries, meats, and related products. It has a facility in Spring Valley, California, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods values in excess of $50,000 directly from points located outside the State of California. Fresh & Easy admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Fresh & Easy operates a growing number of grocery stores in a number of States; its Spring Valley facility, located near San Diego, is involved in this case. This store is entirely self-checkout in that customers instead of store employees scan the items they purchase, pay to a register, and bag their own purchases. Customer associates assist customers in checking out their purchases, approve purchases of alcoholic beverages, gather shopping carts, stock items on shelves and displays, and do other things as needed. Typically two to four customer associates are at work at the same time. The customer associates report to a team lead; typically one but sometimes two team leads work at the same time. The team leads, in turn, report to a store manager.

Fresh & Easy has a rule that prohibits "Unauthorized solicitation or distribution on Company property while on Company time." It also maintains the following policy:

> Solicitation and Distribution Policy
>
> > At fresh&easy we always try to be involved in our neighborhoods. And we hope you do too. Whether it's helping out with a political campaign or raising money for a charity, we encourage all of our team members to take an active part in their communities. But community activity should take place outside of your work time at fresh&easy—that helps us avoid disruptions in the workplace and conflict between our team members. fresh&easy prohibit (sic) solicitation of employees by employees during working time for any purpose.fresh&easy also prohibits the distribution of literature at anytime in any work area for any purpose. Working time includes that of the employee doing the soliciting and distributing and the employee to whom the soliciting and distributing is directed. Working time does not include meal periods, break periods, or any other unspecified periods during the workday when employees are properly not engaged in performing work tasks.
> >
> > . . . .
> >
> > If you break the rules, you may be subject to discipline, up to and including termination.

There is no rule that prohibits employees from talking to each other while continuing to work.

James Tillinghast was the store manager at the Spring Valley store; by the time of the hearing he was manager for another Fresh & Easy store. Sylvia Soliz was a team lead; by the time of the hearing Soliz had left the employment of Fresh & Easy but had also expressed interest in returning to work there.

[1] All dates are in 2009, unless otherwise indicated.

Shannon Hardin works as a customer associate at the Spring Valley store; she has worked there since January 2008.

Employees regularly talk to each other while working about a wide range of subjects that include family, sports, health, and the like. This occurs less often while working at the registers because the employees are often busy with customers, but it occurs there also. So long as the employees continue to work while talking, the team leads and store manager allow these conversations to continue. Employees use their individual badge to clock in and out for their workday and all breaks. In other words, employees are not "on the clock" during their meal and rest breaks.

B. Union Activity and Fresh & Easy's Response

Hardin began supporting the Union and signed an authorization card. On June 11, Hardin had a conversation in the break room with Tillinghast, the store manager. Hardin told him that in case there was any doubt she does support the Union. Tillinghast replied that had been obvious for quite some time. Hardin continued, saying that she would be talking with other employees about the Union, that she would not stop working while she did that, she would continue working as she talked. Tillinghast answered that she was not allowed to talk about the Union while she was on the clock or on the sales floor. Hardin said that if employees can talk about the San Diego Chargers' games or about their kids then they can talk about the Union. Tillinghast asked if she was going to solicit and sell seasons tickets for the Chargers and Hardin replied that she did not even have season tickets for the Chargers. Hardin asked if the rule was Tillinghast's or did it come from corporate, and Tillinghast answered that it was from corporate. Hardin said the rule was wrong and Tillinghast said he would have someone from corporate contact her the next day. Later that day Hardin sent Tillinghast an email message as follows:

> I wanted to write to confirm our conversation this afternoon when I told you I do support having a union at Fresh & Easy. Furthermore, I will be discussing the issues affecting our workplace—and how I believe a union will help solve those issues—with my fellow employees.

The facts in the preceding paragraph are based on Hardin's testimony. Hardin's testimony was detailed and rang true: her demeanor was impressive. I have considered Tillinghast's testimony that he told Hardin that she could not solicit on worktime. He admitted he could have told Hardin not to solicit "on the clock." As the Union brought out in its cross-examination of Tillinghast, Tillinghast was aware of Fresh & Easy's lawful rule concerning solicitation before he spoke to Hardin; this tends to support the credibility of his testimony. And Hardin's email message to Tillinghast that same day summarizing their conversation did not mention any restrictions regarding talking about the Union. But Tillinghast also testified that he always used the word "solicit" when advising employees about what they could not do concerning the union. On this point, the General Counsel presented the testimony of Deborah Kalilimonku; she worked at the Fresh & Easy store from January 2008 until December 2009, at which time she quit. In mid-October, after Fresh & Easy was aware of the Union's organizing effort, she attended a team "huddle" lead by Tillinghast. Kalilimonku credibly testified that Tillinghast said that he had received word from corporate about the union representatives, that they would not be allowed in the store and that the employees were not allowed to *talk* about the union in the store or with each other. Also, Tillinghast's testimony seemed less certain and his demeanor was less convincing than Hardin's. On balance, I credit Hardin's testimony.

The next day, June 12, Hardin was summoned to the break room where Paula Agwu, Fresh & Easy's corporate human relations manager, was waiting to talk to Hardin. Agwu said that she understood that Hardin supported the Union and that was fine, it was Hardin's decision to make. She assured Hardin that there would be no retaliation and that she would not be treated any differently than she had been treated. Agwu added, however, that Hardin was not allowed to solicit while she was on the clock or on the sales floor. At that point Hardin interrupted and asked Agwu to define "solicit." Agwu appeared upset by the question and took some papers from the table and said that Hardin could not hand out paperwork or brochures while she was on the clock or on the sales floor. Hardin replied that she knew that but that she will be discussing that with other employees. Agwu answered, "Well, okay," but that if she has employees telling her that Hardin is harassing them then something is going to have to be done about it. Hardin said that she was not there to harass anybody or break anybody's arm and Agwu said that she was glad that they cleared that up. Agwu then asked if she could ask why Hardin supports the Union. Hardin gave reasons, including that she did not believe in Fresh & Easy's open door policy because she had been retaliated against several times because she called corporate. The General Counsel does not allege that anything that occurred in this conversation is unlawful.

On August 1, Sylvia Soliz, team lead, gave Hardin a copy of a record of verbal warning for events that occurred the day before. The warning indicated:

> Conduct (yelling across store at employees). Shannon yelled for Jason to get carts very loud w/out using bell or phone. Explained to Shannon that yelling in store is not professional.

Hardin told Soliz that she thought the warning was ridiculous because they did not have an intercom system in the store and the bell often did little good as no one responds to it. Hardin told Soliz that she had been yelling across the store to employees to get carts or bags for customers for 1-1/2 years. Hardin pointed out that no one mentioned anything the day before when it happened.

The next day, August 2, Hardin spoke to Zuri Sadai, another customer associate, near the checkout area; Sadai was not working at the time and was in the store for some other reason. Hardin expressed to Sadai that she felt it was ridiculous how she was given the warning when she had been yelling across the store for 1-1/2 years and how other employees did so also. Sadai agreed that it was ridiculous. As they were talking Soliz approached the area and apparently overheard at least part of the conversation because Soliz said, "Well, I know if I had a manager that didn't like me, I would take my check and walk out." Later that day after returning from a meal break Hardin

encountered Soliz as Soliz was stocking items; Soliz was alone. Hardin told Soliz that with the way the economy was and the job market she could not afford to just walk out. Hardin said she had bills to pay and she could not just leave and hope she would find another job. Soliz acknowledged that what Hardin had said was true, but then added, "Well, if you get fired, at least you would get unemployment." Hardin countered that she did not think it was always the case, that it depends on the reason someone gets fired. Soliz said that might be so, but she thought that Hardin would qualify for unemployment compensation benefits if Hardin got fired.

Soliz denied telling Hardin that if the boss did not like her she would quit or that if Hardin got fired she could get unemployment compensation. However, her recollection of the events seemed hazy and her demeanor appeared uncertain. I conclude Hardin's testimony is more credible; it was generally consistent and more filled with believable details.

On August 3, Hardin discussed the matter with Tillinghast. Hardin said that she was not too happy about the warning and that she believed it was their first step in trying to get rid of her because she supports the Union. Tillinghast said no, that the Company did not care that she supports the Union. He said that Hardin is not allowed to talk about the Union on the sales floor or while on the clock. Hardin responded that that was wrong, that as long as you are working you can discuss the Union with other employees. Hardin acknowledged that she could not hand out paperwork or pamphlets or get anyone to sign an authorization card or anything like that, but she could discuss it. When Tillinghast said that if he has a couple of employees coming to him and telling him that Hardin was harassing them Hardin interrupted and said, "Well, there you go with that harassment thing that Corporate brought up." She assured Tillinghast that she was not there to harass anyone but that she was there to answer questions about the Union and discuss it with employees. Tillinghast could not recall whether this conversation with Hardin occurred. In light of this, and for reasons stated above, I again credit Hardin's testimony.

On September 26, Tillinghast gave Hardin a performance improvement plan (PIP) step 1, record of initial written warning that documented an infraction that occurred on September 17. The reason for the warning was:

> The deliberate and obvious disregard of not living the fresh & easy values towards another team member.
>
> . . . .
>
> Shannon was involved in a verbal argument on sales floor with team member Mary Keith on 9/17/09 at the checkouts in close proximity to other employees and 3 customers (per the surveillance video). Both parties claim to have been disrespected verbally leading to an altercation which occurred on the sales floor in front of customers and other employees. Arguments on the sales floor portray a poor representation of Fresh and Easy and every team member has the duty to uphold a high level of service to our customers. Furthermore this is a breach of our values and culture, and Team Member Conduct Policy.

Hardin signed the warning under protest, indicating on the form that the allegations were not true. Tillinghast read the warning to Hardin who then said that the warning was ridiculous and exaggerated and it was not even close to what had happened. Tillinghast said that he had viewed the surveillance camera tape and he was not playing games anymore; Hardin asked for and received a copy of the warning. Tillinghast said that Hardin was not to discuss the warning with other employees while she was on the clock or on the sales floor and he had instructed the team leaders to immediately document if she did so and to send her home. Hardin admitted that she became tearful during this event.

Tillinghast testified that after he read the PIP to Hardin "became emotional and hysterically crying." He told her that she needed to calm down because he did not want that emotion carrying on to the sales floor to customers and other employees thereby creating a disruption. Tillinghast denied telling Hardin that she could not discuss her discipline with other employees; he testified, "I asked her not to carry the emotion onto the floor, in any—I want to say banter, but just the high tensions running at the certain moment, so that it didn't affect our business." I again conclude that Hardin's testimony is more accurate than Tillinghast's.

C. Analysis

I have concluded above that June 11 and August 3, Tillinghast told Hardin that she was not allowed to talk about the Union while on the clock or while on the sales floor. The General Counsel does *not* contend that the use "on the clock" rendered the prohibitions unlawful. This is so because under the facts of this case employees understand that to mean the equivalent of "working time." I have also concluded that Fresh & Easy does not have a rule concerning talking among employees during working time; instead it allows employees to talk to each other while working on a wide range of subjects unrelated to work. So when Tillinghast advised Hardin that she was not allowed to talk about the Union it violated the Act for two reasons. First, the rule was promulgated in response to union activity. Second, the rule prohibits talking only about union matters while allowing employees to talk to each other about other nonwork-related matters.

> It is well established that an employer violates Section 8(a)(1) when, as here, employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' activities in regard to the union organizational campaign. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), enfd. 608 F.2d 762 (9th Cir. 1979).

Teledyne Advanced Materials, 332 NLRB 539 (2000). Citing *BJ's Wholesale Club*, 297 NLRB 611, 615 (1990), and *Super-H Discount*, 281 NLRB 728, 729 (1986), Fresh & Easy argues that the statements made by Tillinghast were isolated and did not rise to the level of an unfair labor practice. Had there only been one such statement this argument might have merit, but Tillinghast repeated the statement twice. Moreover, I conclude below that other unfair labor practices occurred. I therefore reject this argument. By promulgating and maintaining a rule

prohibiting employees from talking about the Union while working but not prohibiting talking about other subjects, Fresh & Easy violated Section 8(a)(1).

Next, I have concluded above that on August 2, while Hardin was discussing her recent discipline with a coworker, Soliz told them that if she had a manager that did not like her, she would quit. The conversation continued a bit later when Hardin explained why she could not afford to quit to which Soliz replied that if Hardin got fired she could then qualify for unemployment benefits. It is well settled that an employer violates Section 8(a)(1) when it invites employees to quit their employment rather than continue to engage in union or protected, concerted activities. *McDaniel Ford*, 322 NLRB 956 fn. 1 (1997). I first examine whether Soliz' comments amounted to an invitation to leave Fresh & Easy's employment. The General Counsel argues:

> Soliz' statement, when objectively viewed, was an invitation to the employees to quit their jobs. This is precisely how Hardin construed it, as she later explained to Soliz in response that she (Hardin) can't afford to quit, and that quitting is not an option.

I agree. The conversations, taken together, amounted to invitations that Hardin find some way to leave her employment. Next, I examine whether Hardin's conduct at the time was concerted activity protected by the Act. Subject to possible time and place limitations, an employee has a right protected by Section 7 of the Act to talk about discipline that he or she has received from their employer with other employees. This is so because the discussions may become the basis for collective action by employees to respond to discipline perceived to be unfair by the employees. *Verizon Wireless*, 349 NLRB 640, 658 (2007); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Here, Fresh & Easy does not point to the existence of any lawful rule that restricts employees' right to talk about such matters. To the contrary, the record shows that Fresh & Easy allowed employees to talked about a wide range of matters unrelated to work so long as the employees continue to perform there work tasks. I conclude that Hardin's discussion with Sadai about her discipline is protected concerted activity. Finally, given the context and timing, I conclude the invitation to quit was directed in response to the protected concerted activity. Fresh & Easy cites *Wyco Medical Products*, 183 NLRB 901, 916 (1970), in arguing that Soliz' comments were lawful. However, the trial examiner in that case cited no authority for his conclusion that such statements were not coercive and it is not clear to me whether the Board upheld these conclusions. In any event, those findings are contrary to the more recent cases cited above. By inviting employees to quit their employment as a response to the protected concerted activities of the employees, Fresh & Easy violated Section 8(a)(1). The complaint alleges that Soliz' comments concerning Hardin qualifying for employment benefits if she got fired constitute two independent violations of Section 8a)(1) in that they amounted to a threat of termination for engaging in union or protected concerted activity. I disagree. I note that the General Counsel's argument in its brief is not supported by case authority. I conclude that the two conversations between Soliz and Hardin are best addressed as a single violation—an invitation to quit in response to protected concerted activity. I therefore dismiss these allegations in the complaint.

Finally, I have described above how on September 26 Tillinghast told Hardin not to discuss the warning he had given her with other employees while she was on the clock or on the sales floor and he had instructed the team leaders to immediately document if she did so and send her home. Hardin was somewhat emotional at the time. As described in the preceding paragraph, employees have a protected right to discuss discipline with other employees. Fresh & Easy asserts "Retail establishments may limit the discussion of discipline on the sales floor." However, the cases it cites do not support this argument. In *McBride's of Naylor Road*, 229 NLRB 795 (1977), and *J. C. Penney*, 266 NLRB 1223 (1983), the Board recited the well-settled proposition that retail businesses may prohibit *solicitation* on the sales floor; those cases do not address the issue on limiting discussion of discipline on the sales floor. Of course, an employer may also properly require that an employee not appear or act in an emotional fashion while interacting with customers, but here Tillinghast did not require that Hardin get past her emotional condition before returning to the sales floor. Instead, he barred her from discussing her discipline without limitations. By prohibiting employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects, Fresh & Easy violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Promulgating and maintaining a rule prohibiting employees from talking about the Union to each other while working but not prohibiting talking about other subjects.

(b) Inviting employees to quit their employment as a response to the protected concerted activities of the employees.

(c) By prohibiting employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

At the hearing the Union requested that this matter be referred to the International Labor Organization. I indicated that it must lay a proper foundation for me to consider such a request, but the Union was unable to properly lay that foundation. Rather, the Union attempted to lay a foundation of the network of treaties involved through the testimony of a store manager. Also, at the hearing and in its brief the Union requests a posting of the Notice to Employees on Fresh & Easy's intranet. The Union indicates that it has already raised the issue in a prior proceeding involving Fresh & Easy that is pending before the Board. The General Counsel does not join in this request. While the Board has discretion to consider remedies not sought

by the General Counsel, I decline to address that issue in this case. As Fresh & Easy points out in its brief, this is hardly a case for the imposition of what at this point remains an extraordinary remedy. The Board has recently invited amicus briefs on this issue; the Union may present its arguments directly to the Board.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Fresh & Easy Neighborhood Market Inc., Spring Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from talking to each other about the Union while working but not prohibiting talking about other subjects.

(b) Inviting employees to quit their employment as a response to the protected concerted activities of the employees.

(c) By prohibiting employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Spring Valley, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from talking to each other about the Union while working but not prohibiting talking about other subjects.

WE WILL NOT invite employees to quit their employment as a response to the protected concerted activities of the employees.

WE WILL NOT prohibit employees from talking about their discipline with other employees while working but not prohibiting talking about other subjects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FRESH & EASY NEIGHBORHOOD MARKET INC.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."